FILE COPY

FILED
JUN 16 1972
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1504

PANOTEX PIPE LINE COMPANY and
CAMERON CRUDE OIL CORPORATION,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN OPPOSITION

Of Counsel:
LLOYD G. MINTER
KENNETH HEADY
Bartlesville,
Oklahoma 74004
C. J. ROBERTS
P. O. Box 1751
Amarillo, Texas 79105

MORRIS HARRELL
STAN McMURRY
4200 Republic National Bank Tower
Dallas, Texas 75201
Counsel for Respondent, Phillips Petroleum Company.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	
I. The petitioners were not prejudiced by the entry of directed verdicts at a point in trial after they had rested and it was proper to consider all the evidence in the light most favorable to them.	16
II. It is not necessary to determine the hypothetical dangerous probability question.	24
III. There was no evidence of any unlawful agreement between Phillips and its wholly-owned pipeline subsidiary.	26
Conclusion	30

Page

Cases

Berenyi v. Immigration Service, 385 U.S. 630, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967) 16

Boeing Company v. Shipman, 411 F. 2d 365 (5th Cir. 1969) 17, 18, 19, 21

Colonial Refrigerated Transportation v. Mitchell, 403 F. 2d 541 (5th Cir. 1968) 20

Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U.S. 271, 69 S. Ct. 535, 93 L. Ed. 672 (1949) 16

Jones v. Home Transportation Co., 422 F. 2d 179 (5th Cir. 1970) 20

Knight v. Loverman, Joseph & Loeb, 217 F. 2d 717, 719 (5th Cir. 1954) 20

United States v. Johnson, 268 U.S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925) 16

U. S. v. McRoberts, 409 F. 2d 195 (9th Cir. 1969) cert. denied, 396 U.S. 1014 20

Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949) 21

Statutes

Art. 2.01 B(3) (b), V.A.T.S. Bus. Corp. Act 28

Art. 6049a, et. seq., Tex. Rev. Civ. Stat. 12

Elkins Act, 49 U.S.C.A., § 41(1), (2), and (3) 12

F. R. Civ. P. 46 20

F. R. Civ. P. 50 19

52 Okla. Stat. § 54 12

Title 28, United States Code, Section 1254(1) 2

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1504

PANOTEX PIPE LINE COMPANY and
CAMERON CRUDE OIL CORPORATION,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN OPPOSITION

This brief is submitted by Phillips Petroleum Company, one of the respondents herein, hereinafter called "Phillips".

OPINION BELOW

The opinion of the court of appeals is not yet reported, but is set forth in the Appendix to this brief. No written opinion was rendered by the trial court.

JURISDICTION

The date of the Judgment and Opinion sought to be reviewed by Panotex Pipe Line Company and Cameron Crude Oil Corporation is February 17, 1972. Petitioners seek to invoke the jurisdiction of this Court under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Respondent does not agree that the questions presented are correctly stated in the petition. Although respondent will follow petitioners sequence of presentation to the extent possible, the only real question is whether both the trial court and lower court were wrong in finding no factual support for the alleged antitrust violations.

1. Did the entry of directed verdicts at a point in trial after petitioners rested require the reversal of the Judgment even though such action was not prejudicial? Was it proper for the court of appeals to consider at the request of petitioners all the evidence in the light most favorable to their case?

2. Should a review be granted for a hypothetical consideration of the dangerous probability requirement when there is no evidence or any reasonable inference in the record of an attempt to monopolize?

3. Should review be granted to consider if both the trial court and lower court were incorrect in their finding that there was no evidence of an antitrust violation?

STATEMENT OF THE CASE

Petitioners have failed to assert any valid reason why this court should grant certiorari. In an effort to make it appear that there was a fact issue for the jury to decide, the petitioners, Cameron Crude Oil Corporation and Panotex Pipe Line Company, assert as fact, matters which are without support in the evidence or any reasonable inference which could be drawn from the record. Both the trial court and the lower court determined, after a complete review of the record, that there was no evidence of an antitrust violation.

A complete review of the entire record by this Court would demonstrate that the lower court properly held that the trial court was correct in directing verdicts for the respondents, Phillips and Shamrock. Such a review of the record would also disclose numerous deficiencies and failures of proof in addition to those discussed by the lower court, which would also preclude any recovery by petitioners.

It seems clear that petitioners' real complaint is that they received competition when none was wanted. As was noted by the lower court:

> "It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. *Northern Pacific Railway Company v. United States*, 1958, 356 U.S. 1, 4-5, 78 S. Ct. 514, 2 L. Ed. 2d 545. Plaintiffs,

> of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more." (Opn., App., p. 23a)

Even with the complained of competition from respondents, the Panotex line was not only constructed and is presently in operation, but also transports 75% of the production from the fields into which it was extended. The President of both Cameron and Panotex admitted at trial that Phillips had not caused a single oil producer to change his commitment from Cameron to Phillips (App., p. 227-232, 554), and that only one producer who had reserved the right to do so, changed his commitment from Cameron to Shamrock. (App., p. 230-232) Except for that one producer, Cameron obtained all of the oil in the Logan field, all of the oil in the Balko field, most of the oil in the Elmwood field, and one-half of the oil in the Como field. (App., p. 231-234) After completion of the Panotex line, Cameron obtained all of the new production from the fields into which both the Phillips pipeline and Panotex pipeline had extended.

The petitioners' allegations of conspiracy and attempted monopoly center around a part of the Texas and Oklahoma Panhandles and the Western Anadarko Basin which they have designated as "Areas I, II, and III", and contend constitute three separate "relevant markets". These three contiguous areas are found in Texas County, Oklahoma, Beaver County, Oklahoma, and Lipscomb County, Texas. They

are a short distance north of the Panhandle field where both the Phillips and Shamrock refineries are located. The Panhandle field which originally supplied the oil for these refineries has been declining in production for several years and has become unable to supply the Phillips refinery requirements. (Opn., App., p. 12a) Phillips looked to the Western Anadarko Basin which was viewed as the logical source of local crude oil to replace the declining production.

In 1961, Phillips made its first major pipeline extension outside the Panhandle field. This pipeline connected three fields in Ochiltree County, Texas, and terminated in the Camrick area field which is located in Texas County, Oklahoma, and Beaver County, Oklahoma. (Opn., App., p. 13a) When this suit was filed in 1964, the Camrick area field was what petitioners designated as "Area I".

Although Dan Cameron testified he had considered extending a pipeline into Camrick, this was not done when it was learned that Phillips planned to extend a pipeline into this area. As to "Area I" the lower court stated:

> "We begin by eliminating Area I. Panotex is not in Area I. Phillips has been there since 1961. Cameron-Panotex makes no case whatever from a factual standpoint on being foreclosed from or restrained in Area I, either through an attempted monopoly or by way of a restraint. The facts at best show only that Area I had no pipeline service until 1961 when Phillips entered. There is no evidence that Cameron-Panotex ever considered entering Area I after the entry of Phillips. The evidence demonstrates no more than a normal business venture on the part of Phillips in entering Area I (Camrick)." (Opn., App., p. 16a)

It is clear from the testimony of Dan Cameron that he abandoned the pipeline he had considered into the Camrick field when he learned that he would be in competition with Phillips. (App., p. 146, 527-528, 724, 729)

After the Phillips line was constructed into Camrick in 1961, truck reception points were established on the pipeline to receive oil that was trucked from developing fields to the east in Beaver County, Oklahoma, such as the Balko, Elmwood, and Como fields. Oil from these fields which was trucked to the Phillips Camrick line, and then transported to the Phillips refinery amounted to about 10% of the Phillips refinery capacity. (Opn., App., p. 14a) The Balko, Elmwood and Como fields are part of petitioners' "Area II".

Phillips had proposed the construction of an extension of its line from Camrick (Area I) to the Como (Area II) for several years, and proposals had been made to the producers. At the time Phillips made these offers to producers in 1962 and 1963, no other party was extending or had proposed to build a pipeline into the Como area. (App., p. 533-535) After Phillips' 1962 and 1963 offers to producers, competitors had appeared on the scene and had made proposals to build their own pipeline in the Como area. These included petitioners, Sunray DX Oil Company, and Derby Refinery Company.

In 1964, Phillips caused the extension of its existing pipeline which terminated in the Camrick field to the Elmwood and Como fields. It is apparently the petitioners' contention that after they announced the proposed construction of the Panotex line into "Area II and III" Phillips should not

have constructed its pipeline into "Area II". In fact, just before Phillips began its line into "Area II" this suit was filed on August 10, 1964, seeking to enjoin its construction. Aside from the fact that Phillips had been purchasing and transporting this production by truck for several years, Phillips is a substantial producer of crude oil in the Como area or petitioners' "Area II" with some 16,000 acres of leases. (Plfs. Ex. 16b, July 14, 1964)

The Como area had considerable potential to produce oil at higher rates than the Phillips forecast had indicated and the chances for additional oil in a growing area were attractive. (App., p. 351, 679-681) The extension of the Phillips line from "Area I" and "Area II" was made along an existing natural gas pipeline right of way already owned by Phillips. Dan Cameron testified that the type of oil produced in the area was in demand and that sulphur content relates to the desirability of crude oil for certain refineries. He also recognized that for an oil company to extend its lines into a new area, it could have as its motive the obtaining of its requirements for a particular type of crude oil for its refinery, and that this would be a legitimate motivation where existing production for an old area was declining. (App., p. 235)

The decision of Phillips to construct a pipeline from Camrick to Como appears to play a major role in petitioners' allegations. The petitioners themselves introduced the deposition testimony of John Houchin, member of the Phillips Executive Committee who was responsible for the supply and transportation department of Phillips headed

by Mr. Fair, on how the decision to build the Phillips line occurred. Fair reported to Houchin on July 29, 1964, that Panotex had announced the construction of a pipeline into the Como area. Since Cameron had written commitments from approximately 80% of the producers it is clear that Phillips had to act when it did if it intended to continue to compete for the oil. One of petitioners' witnesses testified that unless competing lines move into a field at about the same time, there is never but one line in the field and no competition exists in the acquisition of the producer's oil (App., p. 734, 735, 818-819), but that when two competing pipelines move into an area at about the same time, there can be a splitup in the lease connections, with the producers having a choice in deciding with whom they will deal. (App., p. 734-735)

There is no evidence that petitioners' "Areas I, II, and III" constitute separate markets or even one market. The only thing that petitioners' witness testified to was the name of the fields located in these circles drawn on a map. (App., p. 522-532) In fact, Plaintiffs' Exhibit 118 reflects a different "Area III" than their Exhibit 49. The witness who identified the fields testified that he did not know the basis for including the different fields in the circles or how the particular areas were determined. (App., p. 648-649) After this arbitrary designation, Phillips had a pipeline in "Area I", Phillips and Panotex have pipelines in "Area II", and Panotex and Shamrock have pipelines in "Area III".

The contention that the relevant market in this case constituted a "natural monopoly" and that the Panotex line

had a right to be the only pipeline because it was the first pipeline to announce construction was answered by the lower court:

> "It is a fact also that a pipeline tends to be a natural monopoly. Plaintiffs offered testimony to the effect that the first pipeline into an area customarily gets the connections that are available in the oil fields. If two lines enter at about the same time, they are likely to divide the available production." (Opn., App., p. 11a)
>
> * * *
>
> "* * * the fact that a pipeline can be a natural monopoly does not mean it is protected from competition." (Opn., App., p. 23a)

This is exactly what happened in the present case since all of the pipelines in petitioners' "Areas II and III" were constructed at approximately the same time. There is no evidence that any of the pipelines have been unprofitable, but even if a situation had existed where the relevant market would support but one pipeline, the producers had a right for competition to exist.

Cameron and Panotex place great emphasis upon the word "control". In the minutes of Phillips Committee reports, the statement is made that it would be in Phillips "best interest to control a large percentage of the crude oil reserves serving its refineries", and that "Unless Phillips is able to purchase this crude on the basis outlined above other purchasers may lay a line to the area and obtain control of the oil." This is only a recognition that trucks cannot compete with pipelines, and a reference to the normal control which a pipeline provides. The court of appeals ob-

served that a trucking operation is not competitive with a pipeline. (Opn., App., p. 11a) Phillips had been obtaining oil from its own leases and others in "Area II" by truck, and desired to be in a position to continue to compete for the oil. In order to do so it was necessary to construct a pipeline because petitioners were about to construct a pipeline. In any event, it is clearly lawful to change competitive methods by using a superior method of transporting, and the petitioners' pipeline had the same "control" over production that the Phillips pipeline had.

Much of petitioners' argument is based upon the contention that the Phillips line was uneconomic, and the assertion that the tariff agreement between Phillips and Phillips Pipe Line was a subsidy of an uneconomic line. Phillips Pipe Line Company did not deal with the producers or consider questions relating to the price to be paid by Phillips for purchased oil. In fact, the personnel of Phillips Pipe Line, who worked on the project, were not aware of Panotex or Shamrock's proposal. (App., p. 377-378, 379, 380-381, 384-385) Petitioners completely failed to establish that the Phillips line was uneconomic, or that Phillips believed that the line would be uneconomic at the time it was built. Their argument is in large part based upon the change in the amortization charge.

Before the actual construction of the Panotex line was announced, Phillips had made several formal written proposals to the producers for the construction of a pipeline to these fields. In 1962, Phillips had offered the producers a proposed extension from the Camrick area to the Como

area. This proposal used an amortization charge of 17¢ per barrel (Plfs. Ex. 56-f-1), and a 24.5¢ per barrel tariff that was based upon a forecast of 10,000 barrels over a ten-year period. (App., p. 487-489, Plfs. Ex. 16c, July 29, 1962) Although Phillips obtained some favorable responses to this offer, sufficient oil was not obtained to meet the amount of oil specified in the 1962 offer. (Opn., App., p. 17a)

In 1963, Phillips made a second offer to the producers in the Como area. The oil that was forecast upon which this proposal was based had increased eleven million four hundred thousand barrels since the last proposal. (Plfs. Ex. 16c, February 22, 1963) Phillips made a third offer to producers to construct a pipeline in the Como area on July 20, 1964. This offer was cancellable on twenty-four hours' notice and called for a line to be built when 6,000 barrels per day were available and included the Balko, Elmwood, Como, and Logan fields. A producer amortization charge of 10¢ rather than 17¢ was proposed.

The reason cited by the Executive Committee for the disapproval of a recommended 17¢ amortization was that the long term of the proposed contract and the amount of the charge were simply not acceptable to the producers. Also, the reduction in tariff by Phillips Pipe Line Company from 24.5¢ to 17.5¢ must be viewed in light of the fact that the 24.5¢ tariff was based upon 10,000,000 barrels to be transported to the line while the 17.5¢ charge was based upon a total of 22,140,000 barrels. (Plfs. Exs. 16c, 17-q) Plaintiffs offered no proof that either proposal would not provide the pipeline company its normal return of 6 to 8%.

As it turned out both Cameron and Phillips paid the same net price to producers.

In that Phillips Pipe Line Company was acting as a common carrier, it was necessary for Phillips not to violate the Elkins Act, 49 U.S.C.A. § 41(1), (2), and (3), and the Common Purchaser Statutes of both Texas and Oklahoma, Art. 6049a, et. seq., Tex. Rev. Civ. Stat., and 52 Okla. Stat. § 54. The Elkins Act prohibits any kind of discrimination, such as indirect rebates in favor of Phillips by the pipeline subsidiary, and the aforementioned state laws also oppose discrimination in price between various producers. Phillips could not cause Phillips Pipe Line Company to build a line without providing for an adequate tariff. A tariff had to be charged that would not discriminate against shippers using other lines of the pipeline company. It was not possible to set a fixed tariff because Phillips did not know how much production it would receive or how far the line would extend, and thus the amount of the investment which would be required. Phillips agreed to pay a tariff that was flexible to the extent that it could be revised upward if needed to provide the normal return to the pipeline subsidiary. This agreement was made to avoid any question of discrimination or indirect rebates in favor of Phillips under the Elkins Act, 49 U.S.C.A. § 41(1), (2), and (3).

Petitioners' contention that the Phillips line was uneconomic was not supported by the record. As mentioned, the Phillips Executive Committee had previously approved a fixed tariff for the proposed pipeline that was based on a specified number of barrels. (Plfs. Ex. No. 16c) Since that

number of barrels was not assured because of the activities of other crude purchasers, the Executive Committee upon the request of Mr. Houchin authorized Phillips pipeline to charge whatever tariff was necessary to return the pipeline company its normal rate of return on the actual number of barrels transported through the line. (App., p. 492-502) Phillips and Phillips Pipe Line entered into a written agreement to that effect. (Plfs. Ex. No. 17-q) Houchin made the decision to proceed to build the line so that Phillips would be in a position to obtain the oil from its own leases and to compete for the oil which it might purchase from others. (App., p. 493, 501-502)

The argument that a conspiracy was established by the telephone call from Cash of Shamrock to Harris of Phillips, along with the fact that Phillips did not extend its pipeline into Logan, is without merit. The petitioners themselves introduced the deposition testimony of Mr. Cash and having knowingly introduced that evidence they are bound by it. They also established that when Cash inquired if Phillips had an interest in the Logan area he was told that Phillips did have such an interest and that he replied, "Well, we think we need that crude oil as a future supply of crude oil for our refinery and we are going to have to go in there, too, and I said, it won't be the first time that we have been competitors and that was all of our conversation."

The Phillips line did not actually extend into Logan (Area III). Phillips made the same offer to the producers in Logan that it extended to the producers in petitioners'

"Area II" but no producer accepted that offer. In order for Phillips to obtain production of producers committed to petitioners it would have had to raise its posted price throughout the Texas and Oklahoma Panhandles. The amount of oil available did not warrant Phillips raising its posted price. One can be sure that petitioners would have complained if Phillips had taken this action. As was noted by the lower court:

> "Plaintiffs make much of the fact that Shamrock extended to Logan and Phillips did not. Phillips went no further east than the Como field in Area II while Shamrock went no further west than Logan. Standing alone, this might give rise to an inference of a division of markets between Phillips and Shamrock to the detriment of their mutual competitor, Panotex. But this evidence does not stand alone.
>
> "Phillips had been seeking commitments in the Logan area without success. Panotex had every producer in the field except one. Shamrock acquired that one. The interest of Phillips was such that it staked a right of way into Logan but abandoned the prospect for lack of business.
>
> "Phillips had production of its own in the Como field and some additional suppliers. These facts gave good reason for Phillips to stop at Como and for Shamrock to stop at Logan." (Opn., App., p. 22a)

Petitioners themselves disproved the unsupported allegation that Phillips interfered with their financing of the Panotex line at a Houston bank. Although the Petitioners established that Phillips had made deposits in the bank, these occurred before the bank ever heard of the Panotex project. (App., p. 753-754) Petitioners knowingly intro-

duced the deposition testimony of the bank loan officer who dealt with petitioners. He testified that the bank required that Panotex "get the oil tied up" because there was "a lot of competition in getting it tied up" (App., p. 307-309), and that Panotex furnish evidence of a long-term contract for the sale of the oil that it planned to gather and move to Elk City. (App., p. 290-292) The bank was troubled because its requirements were not met. (App., p. 291-310) The bank's consultant contacted Phillips, Humble and Shell about committing their oil to the Panotex line (App., p. 318-319), and Phillips informed the consultant that it would not commit its oil to the proposed line because "this is a very desirable crude." (App., p. 325-327, 329-331) In fact, this was the only contact with Phillips and the bank never refused to finance the project. As was noted by the lower court: " * * * There is no evidence that Phillips influenced by word or deed the decision not to make the loan. There the matter ends." (Opn., App., p. 20a) Also, in this regard, the action of the court of appeals in affirming the district court's exclusion of hearsay statements of the petitioners' agent was in all respects correct. As was noted:

> " * * * The court properly refused to admit the conclusions and opinions of Cameron's agent which were contained in the letters and memoranda. They were not admissible under the Business Records Act, 28 USCA, § 1732(a); *Standard Oil Company of California v. Moore*, 9 Cir., 1957, 251 F. 2d 188, 213-14." (Opn., App., p. 9a, 10a)

The fact of the matter is that the petitioners themselves by deposition testimony introduced the exact reason why the

Houston bank did not finance the Panotex project and they are bound by this testimony.

ARGUMENT

The petition for a writ of certiorari should be denied in that it seeks a review of a lower court decision that turns solely upon an analysis of the particular facts involved. *United States v. Johnson*, 268 U.S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925). The only real question presented is whether there was any evidence or reasonable inference in the record of an antitrust violation by respondents which injured the petitioners in their business or property. The trial court said no after hearing all the evidence. After reviewing the entire record, the court of appeals agreed. Thus "a court of law such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 69 S. Ct. 535, 93 L. Ed. 672 (1949) and *Berenyi v. Immigration Service*, 385 U.S. 630, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967).

I.

THE PETITIONERS WERE NOT PREJUDICED BY THE ENTRY OF DIRECTED VERDICTS AT A POINT IN TRIAL AFTER THEY HAD RESTED AND IT WAS PROPER TO CONSIDER ALL THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THEM.

The court of appeals announced no new proposition of law and its decision is limited to these facts. There is no

substantial question present. The petitioners were not prejudiced by the fact that the trial court entered directed verdicts at a point in trial after they had rested. Petitioners asked the lower court to apply the sufficiency of the evidence test set forth in *Boeing Company v. Shipman*, 411 F. 2d 365 (5th Cir. 1969), the lower court correctly did so, and petitioners cannot now complain.

When the Judgment of the trial court and the opinion of the lower court are considered, it is clear that their argument is without merit, because petitioners received the most favorable review possible. The judgment entered by the trial court provides in part as follows:

> "The court having considered defendant Phillips Petroleum Company's motion for directed verdict as to plaintiffs' action against it, the court determined and announced that the motion of Phillips Petroleum Company for directed verdict as to plaintiffs' action against it should be and was granted. Further, the court after viewing all the evidence in the light most favorable to plaintiffs, *and considering only the evidence and reasonable inferences which support plaintiffs' theory, and giving the evidence all inferences most favorable to plaintiffs*, is of the opinion and finds that there is no fact issue for the jury with respect to plaintiffs' action against Phillips Petroleum Company, and no evidence with respect to which a jury of reasonable men could differ on the conclusions to be reached from the evidence with respect to plaintiffs' action against Phillips Petroleum Company;" (App., p. 85) (emphasis supplied)

Petitioners have changed their position. Now they complain that the Fifth Circuit Court of Appeals should not have used the test set forth in *Boeing Company v. Ship-*

man, 411 F. 2d 365 (5th Cir. 1969). This is *not* what they said when they were before the lower court. In the Brief for Appellants in the court of appeals, petitioners stated:

> "The test for determining whether a directed verdict should be granted was laid down by this Court in *Boeing Company v. Shipman*, 411 F. 2d 365, 374-375 (1969) *(en banc)*:
>
> > 'On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence * * *'
>
> * * *
>
> "This standard was recently applied by this Court in an antitrust case presenting certain of the issues raised by this appeal. *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 438 F. 2d 1286 (5th Cir. 1971)." (Brf. for Appellants in Ct. of Appls., p. 34, 35)

In discussing the test to be applied, the lower court held, as petitioners had asked them to hold, that:

> "We now turn to question whether the court erred in directing verdicts for defendants or either of them. The test to be applied is the now familiar one of *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F. 2d 365 (en banc), where we said:
>
> > 'On motions for directed verdict * * * the Court should consider all of the evidence — not just that evidence which supports the nonmover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is,

> evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.' 411 F. 2d at 374." (Opn., App., p. 10a, 11a)

Now petitioners say that the Court should *not* consider all the evidence and that it was improper to use the standard set forth in *Boeing Company v. Shipman, supra.* The most one can say of petitioners' position is that it is flexible.

Although the court of appeals noted that Rule 50 of the Federal Rules of Civil Procedure contained no restriction on the granting of a motion for directed verdict during the presentation of a defendant's case and that no authority supporting such a restriction had been found, the Court expressly held that it was not necessary for it to reach this question. Instead, the lower court found that petitioners had not been prejudiced by the procedure which was followed. The court of appeals held:

> "In the end, the question of directing a verdict for a defendant during the defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed." (Opn., App., p. 6a)

The trial court considered only the evidence and reasonable inferences which supported the petitioners' theory and gave the evidence all inferences most favorable to them. The trial court did not grant the directed verdicts on the

basis of affirmative defenses, or consider any of the evidence favorable for the respondents or any of the evidence that conflicted with petitioners' evidence. In short, there was nothing for petitioners to rebut. The evidence offered by the petitioners and the favorable evidence for petitioners, if any, introduced after they had rested, did not raise any fact issue that Phillips had violated the Sherman Act.

It should be made clear that petitioners failed to inform the trial court of any evidence they had to offer, which would have created a jury question although they had ample opportunity to do so. Rule 46 of the Federal Rules of Civil Procedure require that the complaining party make known the ground for objection to the granting of motions. Petitioners have waived their point on appeal. *Colonial Refrigerated Transportation v. Mitchell*, 403 F. 2d 541 (5th Cir. 1968); *Jones v. Home Transportation Co.*, 422 F. 2d 179 (5th Cir. 1970); *Knight v. Loverman, Joseph & Loeb*, 217 F. 2d 717, 719 (5th Cir. 1954); *U. S. v. McRoberts*, 409 F. 2d 195 (9th Cir. 1969), *cert. denied*, 396 U.S. 1014.

With regard to the contention that it was improper to consider all of the evidence presented it should first be noted that the provision in the Judgment and statement of the trial court that the "motions for instructed verdict are granted upon the state of the record at the time the motions were granted" was included on the specific request of petitioners' counsel. (App., p. 1207) No request to consider just the evidence introduced prior to respondent presenting evidence was made. Also petitioners' assertion that "the trial court had reserved to Cameron-Panotex the right

to introduce evidence in rebuttal" is incorrect. Although petitioners requested permission of the trial court *not* to put on all their case prior to resting, this request was denied. The trial court's reason was "to get all the evidence in so I could have everything before me that you (petitioners) had to offer" for the test of a motion for instructed verdict. Also, petitioners' references to the colloquy between court and counsel on the evidence is misleading. This reference seemed to indicate that the trial court believed that there was a fact question for the jury, but these observations gave way to the trial court's final decision and recitation in the judgment.

Aside from the fact that the petitioners specifically requested and asked the court to have the record reflect that the directed verdicts were being granted upon the state of the record at the time the motions were granted, it is clear that the procedure which was followed was the most favorable to petitioners. Both the trial court and the court of appeals followed the proper procedure. *Boeing Company v. Shipman*, 411 F. 2d 365 (5th Cir. 1969) which was decided *en banc* has established the proper standards for consideration of motions for directed verdict in the Fifth Circuit since that case was decided on April 7, 1969. This case contains an exhaustive review and analysis of the distinction between Federal Employee Liability Act cases such as *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949) and other cases. *Boeing Company v. Shipman, supra*, used the following language:

> "As a corollary to the unique statutory context of FELA actions, it is apparent that in the general run

of cases federal courts have rejected the legendary 'scintilla' test. Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720 (1930). In 5 Moore, Federal Practice ¶ 50.02 [1], p. 2324 (2d ed. 1968), we find the following pertinent commentary:

> 'The federal courts are generally committed to a rejection of the so-called "scintilla rule," by which a court might not direct a verdict so long as there is any evidence in support of the proposition tendered by the party against whom the motion is directed. An argument might well be made that such a rule survives, in fact, if not in name, in FELA and Jones Act cases. [See e.g., Harlan, J., dissenting in Ferguson v. Moore-McCormack Lines (1957) 352 U.S. 521, 563-564, 77 S. Ct. 457, 480, 1 L. Ed. 2d 511, 519.] If so, its application is limited to those areas and cannot be extended beyond those special domains.'

"We agree with Professor Moore's analysis and conclusion that the FELA test should not be employed as a vehicle to re-establish the 'scintilla' rule which has been so firmly rejected by the federal judiciary."

* * *

"Finally, the Seventh Amendment of the United States Constitution providing for trial by jury does not require, either expressly or impliedly, that the test of sufficiency of evidence to create a jury question in a non-FELA federal case be the same as in an FELA case. The tendency of some federal courts, at times, to use overly broad language or to cite indiscriminately FELA cases in non-FELA situations does not obviate this conclusion. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-701, 82 S. Ct. 1404, 1411, 8 L. Ed. 2d 777 (1962); Harris v. Pennsylvania Railroad Co., 361 U.S. 15, 16, 80 St. Ct. 22, 23, 4 L. Ed. 2d 1 (1959) (Mr. Justice Douglas, concur-

ring); Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 3 Cir., 1963, 325 F. 2d 2, 22."

It must also be remembered that in this case we do not have a situation where the trial court considered any evidence introduced by the respondents which was favorable to the respondents in connection with the determination of whether or not directed verdicts should be rendered. The trial court expressly stated that it was "considering *only* the evidence and reasonable inferences which support Plaintiffs' theory, and giving the evidence all inferences most favorable to Plaintiffs." (App., p. 85) (emphasis supplied) The United States Court of Appeals for the Fifth Circuit used the following language:

> "At the same hearing, plaintiffs urged the court to make it clear in the final judgment that the motions for directed verdicts were granted on the state of the record at the time the motions were granted. The court and all counsel agreed that this was the case and the judgment so provides."
>
> * * *
>
> "This case began in 1964. It has been strenuously developed through discovery and otherwise. It occupied more than two weeks of trial time. In the end there is no substance to plaintiffs' claims. Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from established facts, we have nothing more than competition between the parties." (Opn., App., p. 4a, 22a, 23a)

The record presents no legal issue which will govern other cases, only a factual situation of interest only to the parties. There is no issue of public importance.

II.

IT IS NOT NECESSARY TO DETERMINE THE HYPOTHETICAL DANGEROUS PROBABILITY QUESTION.

The petition raises no legal or policy question fundamental to the effective administration of private antitrust actions. A fair reading of the opinion of the court of appeals reflects that the lower court found that petitioners had failed to introduce any evidence of an attempt to monopolize, not just that Petitioners had only failed to establish a dangerous probability of success. The necessity of establishing probability is hypothetical under the circumstances of this case and a writ of certiorari should not issue, particularly where petitioners assumed that they had the burden of establishing dangerous probability in the court of appeals and based their argument on the contention that they had met this burden. Again, petitioners urge this court to pass on matters which were not at issue in the lower court and which need not be decided by this Court. In the court of appeals, petitioners argued that "There was a dangerous probabilty that Phillips' and Shamrock's attempts to monopolize would succeed", rather than taking the position that it was not necessary to establish that there was a dangerous probability of success. They stated in their brief before the lower court that:

> "Whether there must be proof of a relevant market or a dangerous probability of monopolization is open to 'some dispute.' See authorities cited in Woods, supra, at p. 7. However, it will be assumed here that three elements must be shown, namely; (i) the relevant market, (ii) specific intent to monopolize this market

and *(iii) a dangerous probability of success.*" (Brf. for Appellants, Ct. of Appls., p. 41) (emphasis supplied)

The record, judgment of the trial court, and opinion of the court of appeals reflects that petitioners failed to establish any of the necessary elements of an attempt to monopolize charge, not just dangerous probability of success.

The lower court held:

> "At this point we find that the evidence of a conspiracy between Phillips and its pipeline subsidiary is nonexistent from the point of showing a violation of §§ 1 or 2 of the Sherman Act.
>
> "This is likewise true as to a showing an attempt to monopolize on the part of Phillips. Assuming *arguendo* intent and a relevant market, a dangerous probability of success is clearly lacking. See *Cliff Food Stores, Inc., v. Kroger, Inc.*, 5 Cir., 1969, 417 F. 2d 203, 206-08.
>
> "The action of Phillips in extending into Area II did not rise above a protective motive. Phillips was already present through a trucking operation and through its own production. Panotex was transporting in another direction and away from Phillips' refinery. Protection of its refinery by the assurance of some of the oil reserves in Area II was no more than a normal business practice absent conduct calculated to bar the entry of a competitor into Area II or to drive a competitor out of the area. The proof disclosed no such conduct on the part of Phillips. There was no proof of predatory conduct or of conduct which was illegal per se. It follows that the proof was insufficient to make a jury question as to a restraint of trade by Phillips from the conduct disclosed to this point." (Opin., App., p. 18a, 19a)

The court of appeals based its holding that the trial court was correct in directing a verdict for Phillips on the attempt to monopolize allegation on the fact that there was a complete failure of proof. This is made clear by the lower court's holding that it found "no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of Defendants individually or collectively." (Opn., App., p. 23a) The decision below is correct.

III.

THERE WAS NO EVIDENCE OF ANY UNLAWFUL AGREEMENT BETWEEN PHILLIPS AND ITS WHOLLY-OWNED PIPELINE SUBSIDIARY.

The Court of Appeals ruling with respect to the transaction between Phillips Petroleum Company and its wholly-owned subsidiary, Phillips Pipe Line Company, presents no substantial questions under the antitrust laws. Both the trial court and court of appeals carefully considered and reviewed the facts, applied the well established principles and standards of the antitrust law and concluded that there was no violation of the antitrust law. The record is one of allowable competition — nothing more.

There is no evidence of any unlawful agreement between Phillips and its pipeline subsidiary. Phillips had been purchasing oil from the Como area for its refinery by truck for several years. As previously noted, petitioners' witnesses testified that trucks cannot compete with a pipeline and that the first line in an area ordinarily obtains all the production unless two lines come in at about the same time,

in which event, the production may be split between the pipelines. If Phillips did nothing at the time the Panotex line was announced its trucks would have to compete with a pipeline and production which it had been receiving would be lost. Its only alternative was to cause its subsidiary to construct a pipeline so that it would be in a position to compete.

As stated previously the Elkins Act makes it unlawful for a common carrier pipeline to pay an indirect rebate. Phillips had to agree on a tariff which would give its subsidiary a normal return on the investment, but, to set such a tariff, one must know how much oil will be transported and how far the line will extend or the amount of investment that will be required. Phillips did not have this information. Since effective competition can occur only when two lines go into an area at about the same time Phillips agreed to pay its subsidiary whatever tariff was required to give its subsidiary its normal return. Phillips only took that action which was necessary to be in a position to compete for crude oil. The tariff agreement was used to avoid an indirect rebate and violation of the Elkins Act. The timing of the extension and the tariff agreement were neither exclusionary or unfair.

The trial court and the appellate court after considering and reviewing the evidence concluded that the transactions between Phillips Petroleum Company and Phillips Pipe Line Company amounted to nothing more than a proper

business motive under the circumstances, no intent to monopolize, no conspiracy, and no showing of a dangerous probability of the success of any attempt to monopolize. Under a Texas statute (Art. 2.01 B(3) (b), V.A.T.S. Bus. Corp. Act) a refinery who also happens to be an oil producer must use a subsidiary to build and operate a common carrier oil pipeline. Unless a subsidiary is used, the refiner would be dependent upon someone else building a common carrier pipeline to his refinery, which no one else is going to do when the refinery is the only one at a remote place near Borger, Texas. Otherwise, the refinery will be dependent on trucked crude oil, a more costly method of transportation. This is the common manner used by the oil industry in building pipelines which supply refineries. Complying with this local law, a law designed to avoid an environment where the oil producer might tend to favor its own production over that of other producers, does not affect other pipeline competition. Cameron also used a subsidiary to build and operate the Panotex line. The mere fact that Phillips Petroleum Company and Phillips Pipe Line Company entered into a contract to accomplish a proper business motive under the circumstances can in no manner be used to show an intent to monopolize simply because it resulted in competition for Cameron.

The petition can best be summarized as an effort of the petitioners to review or reargue the evidence and the inferences they claim to be drawn therefrom and to inject factual claims which do not exist. The trial court found

there was no question for the jury. The United States Court of Appeals after extensive study of the record concluded:

> "In meeting the Panotex competition, Phillips took three simultaneous steps: (1) it met Cameron's price offer; (2) it met Cameron's contract requirements as to period of contract; (3) it guaranteed its pipeline subsidiary a seven per cent return so as to replace its trucking operation with a pipeline. The proof stops here. It goes no further than to show that Phillips needed the oil for its refinery and would be preempted by the entry and consequent monopoly of another pipeline. It is true that the evidence shows that Phillips considered Area II as 'its own backyard' and sought to protect its position in the area. This, however, amounts to nothing more than a proper business motive under the circumstances. Cf. *Times-Picayune Publishing Company v. United States*, 1953, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277, on the necessity to prove something more than a 'step predominantly motivated by legitimate business aims * * *' to show an intent to monopolize." (Opn., App., p. 18a)

As was noted by the court of appeals:

> "It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law * * * after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more." (Opn., App., p. 23a)

Without this competition, Cameron would be the only purchaser and Panotex the only transporter of crude oil in what petitioners contend is the relevant market.

CONCLUSION

On the record before this Court, there is no substantial question or legal issue of public importance. Petitioners have failed to assert any valid reason why this court should grant certiorari. The opinion of the lower court is well reasoned and is in accord with existing legal precedents. The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

MORRIS HARRELL
STAN MCMURRY
4200 Republic National Bank Tower
Dallas, Texas 75201
Counsel for Respondent, Phillips Petroleum Company.

Of Counsel:
LLOYD G. MINTER
KENNETH HEADY
Bartlesville,
Oklahoma 74004

C. J. ROBERTS
P. O. Box 1751
Amarillo, Texas 79105

CERTIFICATE OF SERVICE

The undersigned, counsel of record herein for respondent, Phillips Petroleum Company, does certify that service of the above and foregoing Brief For Respondent Phillips Petroleum Company In Opposition, was this day accomplished pursuant to Rule 33(1) of the Rules of this Court by depositing four copies of same in a United States Post Office mail box, with air mail postage prepaid, by certified mail with return receipt requested, addressed to Mr. Urban Lester, 1776 K Street, N.W., Suite 709, Washington, D.C. 20006, counsel of record herein for petitioners, Panotex Pipe Line Company and Cameron Crude Oil Corporation; and Mr. W. M. Sutton, Amarillo National Bank Building, Amarillo, Texas, counsel of record herein for respondent, Diamond Shamrock Corporation.

June 14, 1972

Morris Harrell

Morris Harrell
Counsel for Respondent
Phillips Petroleum Company

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1335

PANOTEX PIPE LINE COMPANY, ET AL,
Plaintiffs-Appellants,

versus

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(February 17, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal arises out of antitrust litigation. The district court directed verdicts for the defendants. We affirm.

Cameron and its pipeline subsidiary, Panotex, claimed damages jointly and severally against Phillips

and Shamrock, alleging a conspiracy between them, and also a conspiracy between each of them and their respective subsidiaries, Phillips Pipe Line Company and Shamrock Pipe Line Corporation. The gist of the complaint was a conspiracy, as stated, to restrain and monopolize, and to attempt to monopolize interstate commerce in the purchase and transportation of crude oil in designated areas in violation of §§ 1 and 2 of the Sherman Act. 15 USCA, §§ 1 and 2. The cause of action also alleged individual conduct on the part of Phillips and Shamrock in violation of the same statutes. The prayer was for damages and injunctive relief under §§ 4 and 16 of the Clayton Act. 15 USCA, §§ 15 and 26. The complaint and the evidence introduced in support thereof bottoms out as a claim that defendants attempted to foreclose a competitor, and having failed in that, to thereafter restrict the competitor.

The cause was tried to a jury. Motions for directed verdicts filed by Phillips and Shamrock were denied by the district court at the close of plaintiffs' case. Defendant Phillips then proceeded to put on its defense. Shamrock put in a part of its evidence through cross-examination of witnesses for Phillips. After two days of defense evidence, the court suggested, sua sponte, that Shamrock again move for a directed verdict. Shamrock so moved and the motion was granted. Phillips then asked for the same relief and its motion was granted. Counterclaims against Cameron and Panotex were severed and are not a part of this appeal.

There are three assignments of error. First, plaintiffs urge that it was prejudicial procedural error to

grant motions for directed verdicts in the middle of defendants' cases, i.e., at a random time during the trial. The contention is that a directed verdict may be granted under Rule 50, F.R.Civ.P., only after the opening statement of opposing counsel, at the close of the evidence offered by an opponent, or at the close of all of the evidence, citing 5A Moore's Federal Practice, par. 50.04. Plaintiffs also assign error on a substantive basis in the granting of directed verdicts, urging that the evidence was sufficient to make a jury question. Lastly, error is asserted on the basis of the exclusion of certain items of evidence offered by plaintiffs.

The facts will be detailed in connection with the discussion of the alleged substantive error in directing verdicts for defendants. We proceed first to a discussion of the claimed procedural error.

I.

The motions for directed verdict were granted during the presentation of the defense testimony. There was extensive colloquy between the court and counsel. The posture of the case at the time was somewhat complex in that the counterclaims of each defendant based on alleged antitrust violations by plaintiffs were being tried to the same jury. Plaintiffs' proof was voluminous and the court indicated that it had reviewed all of the testimony to date and was inclined to reconsider the motion of Shamrock for a directed verdict, and also to sever Shamrock's counterclaim. (This was the previously overruled motion for directed verdict.)

The court then ruled as indicated for Shamrock. At that point, plaintiffs joined with Phillips in moving for a mistrial because of the hiatus and confusion left in the proof as to liability and damages due to the removal of Shamrock. Phillips had moved for a directed verdict following the grant of Shamrock's motion but this motion was overruled. Following the joint motion for mistrial, the court reconsidered and granted Phillips' motion for directed verdict and also severed its counterclaim.

At no time during the proceeding did plaintiffs offer any objection whatever to the timing of the directed verdicts. Moreover, nothing was said during the proceeding which pointed to any prejudice to plaintiffs from the standpoint of timing.

There was a hearing on the form of the final judgment about a month later. At this hearing, plaintiffs took the position for the first time that they were prejudiced by the timing of the grant of the motions in that they had previously reserved the right to redirect examination of certain witnesses. The record does not reflect this reservation. The court, in fact, required plaintiffs to complete their case prior to closing.

At the same hearing, plaintiffs urged the court to make it clear in the final judgment that the motions for directed verdicts were granted on the state of the record at the time the motions were granted. The court and all counsel agreed that this was the case and the judgment so provides. Having this in mind, plaintiffs take a different position here with respect to prejudice.

They no longer urge the reservation of the right to redirect examination of the witnesses. They now contend that the court granted them the right to rebut evidence put in by Phillips in two instances. This evidence, produced from the files of Shell Oil Company, consisted of commitments to Cameron from oil producers to sell crude oil for transportation by Panotex. The pipeline of Panotex connected with that of Shell and all Cameron sales were to Shell. The other evidence was the record of oill deliveries from Cameron to Shell via Panotex. We are unable to perceive the need to rebut this evidence. We are not told how it could be rebutted, nor how it was in anyway prejudicial. We find no prejudice to plaintiffs in these events.

We do not reach the question whether Rule 50, F.R. Civ. P.,[1] prohibits the granting of a motion for directed

---

[1]Rule 50:

"(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

"(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . ."

verdict during the presentation of a defendant's case. The rule contains no such restriction nor have we found any authority supporting such a restriction. Indeed, we have found no case in point one way or the other. The Supreme Court long ago pointed to the salutary purpose of a motion for directed verdict. In *Merchants' National Bank of Boston v. The State National Bank of Boston*, 1871, 77 U.S. 604, 19 L.Ed. 1008, it was said with reference thereto:

> "According to the settled practice in the courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court." 77 U.S. at 637

In the end, the question of directing a verdict for a defendant during the defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed.

From the view that plaintiffs must show prejudice, the situation is analogous to federal criminal procedure where the court commits error by reserving a ruling on a defendant's motion to acquit. The error is harmless absent a showing that the evidence was insufficient to sustain a conviction when the government rested its case. *Cooper v. United States*, 5 Cir., 1963, 321 F.2d 274, 277; *Montoya v. United States*, 5 Cir., 1968, 402 F.2d 847, 849-50; *United States v. Day*, 5 Cir., 1971, 438 F.2d 121, 122.

As Justice Field stated for the court in *Oscanyan v. Winchester Repeating Arms Company*, 1881, 103 U.S. 261, 26 L.Ed. 539, in a case where a verdict was directed following the opening statement of counsel:

> "... if in the progress of a trial, either by such admission [of counsel] or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." 103 U.S. at 263

II.

Before considering the merits of the action of the district court in granting the motions for directed verdict, it will be necessary to resolve the question presented with respect to the exclusion of certain evidence offered by plaintiffs. This question involves three separate items.

The first item is an inter-corporate letter from one Phillips employee to another, dated November 11, 1960, setting out the general situation in the industry as to oil reserves in the general geographical area pertinent to this suit. The letter mentions the prospect of raiding Shamrock's customers to increase Phillips' crude oil supply. The crude oil reserves and acquisition prospects of many oil companies in the area are also discussed. The position of plaintiffs is that this letter was admissible to show motive for later concerted action between Phillips and Shamrock. The district court excluded it on the ground that it originated prior to the period of activities giving rise to the suit.

We hold that this letter was admissible, and was to be given such weight as it might deserve in light of the proof, if any, as to any future concerted action between Phillips and Shamrock. Cf. *Federal Trade Commission v. Cement Institute*, 1948, 333 U.S. 683, 705, 68 S.Ct. 793, 92 L.Ed. 1010. Accordingly, it will be considered here in determining whether verdicts should have been directed.

The next item was a contract showing that Shamrock purchased casinghead gas from oil producers. Plaintiffs, not having a refinery, purchased only crude oil and condensate. The argument is that Shamrock used casinghead gas purchases as a lever to obtain contracts for the purchase of crude oil and condensate; hence, an illegal tying arrangement. The district court excluded this evidence on the ground that it was irrelevant to the pleadings.

Ordinarily this evidence would have been admissible to show the vehicle for an illegal tying arrangement as a part of an attempt to monopolize or restrain trade on the part of Shamrock. The admission would be subject, however, to the introduction of some evidence of a tying arrangment. There was no proffer of evidence to show such a tying arrangement at the time this evidence was excluded nor at any other time. Thus the error was in the abstract and harmless.

The third item of evidence is a group of letters and memoranda having to do with the effort of Cameron to obtain a loan from the First National City Bank of Houston, Texas, with which to finance their proposed pipeline. The fact of attempting to obtain this loan was stipulated. There was also full testimony regarding the effort. Plaintiffs wished to put in such portions of the letters and memoranda as would reflect Phillips' alleged antagonism to the proposed pipeline and as would provide a basis for an inference that the loan was not made because of Phillips' influence over the bank. The district court excluded this evidence on grounds that the documents contained hearsay, as well as self serving opinions and conclusions on the part of a Cameron agent. With these objectionable portions removed from the documents, the court was of the opinion that nothing of coherent value would remain to be considered by the jury.

This evidence consisted of twelve letters and three memoranda prepared by Cameron's agent and one letter from an officer of the Houston bank regarding Cameron's application for the loan. The court properly

refused to admit the conclusions and opinions of Cameron's agent which were contained in the letters and memoranda. They were not admissible under the Business Records Act, 28 USCA, § 1732(a); *Standard Oil Company of California v. Moore*, 9 Cir., 1957, 251 F.2d 188, 213-14. No effort was made by plaintiffs to introduce the documents with the conclusions and opinions deleted and thus we need not consider whether the remaining documents or parts thereof qualified as an exception to the hearsay rule under the Business Records Act. The court did not err in excluding this evidence.

There is one other item of excluded evidence concerning which plaintiffs assign error but it goes to the question of damages. As will be seen, we do not reach the question of damages and thus it is unnecessary to consider this assignment of error.

III.

We now turn to question whether the court erred in directing verdicts for defendants or either of them. The test to be applied is the now familiar one of *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365 (en banc), where we said:

> "On motions for directed verdict ... the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and infer-

ences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." 411 F.2d at 374.

Phillips and Shamrock were integrated oil companies in that they owned and operated refineries in the geographical area with which we are concerned. They transported their own production as well as the production of others to their refineries. The transportation was by their subsidiary pipeline companies. Cameron had no production but purchased from others for transportation over Panotex, its subsidiary, to Shell's pipeline.

It is a fact also that a pipeline tends to be a natural monopoly. Plaintiffs offered testimony to the effect that the first pipeline into an area customarily gets the connections that are available in the oil fields. If two lines enter at about the same time, they are likely to divide the available production. In addition, a trucking operation is not competitive with a pipeline.

As the Supreme Court has noted, *Federal Trade Commission v. Cement Institute*, supra; *Standard Oil Co. v. United States*, 1911, 221 U.S. 1, 46, 31 S.Ct. 502,

55 L.Ed. 619, evidence as to events prior to and following alleged antitrust activity is admissible if it tends to show the purpose and character of particular transactions under investigation. Thus it is that the charges against defendants must be viewed in the background of the facts as they existed prior to entry of Cameron and Panotex into the pipeline market; indeed prior to the creation and construction of Panotex.

Background and Relevant Markets

The controversy involves competition between three pipelines, Phillips, Shamrock and Panotex, in the general area of the Texas-Oklahoma border. Oil situated in two counties in Oklahoma is involved: Beaver and Texas Counties. These counties border on the north boundary of the State of Texas. Oil situated in ten Texas counties lying immediately south of these Oklahoma counties is also involved. The counties are Hansford, Ochiltree, Lipscomb, Moore, Hutchinson, Roberts, Hemphill, Carson, Gray and Wheeler.[2]

Phillips' refinery is in Hutchinson County. Shamrock's refinery is in Moore County. As of 1954, the crude oil for these refineries was supplied out of the Texas panhandle oil field, in Moore, Hutchinson, Roberts, Carson, Gray and Wheeler Counties. The reserves in this field were becoming inadequate to meet the needs of the refineries. New fields were being developed in the counties to the north and east. By 1957, Shamrock

[2]See Appendix A attached for a map of the general area and the pipelines pertinent to this litigation.

had extended its pipeline north into fields located in Hansford and Ochiltree Counties. Phillips remained in the panhandle.[3]

By 1961, Phillips had extended its pipeline through the southeast corner of Hansford County to connect one field, and on through Ochiltree County to connect with several fields and into Texas and Beaver Counties in Oklahoma (the Camrick area) to connect with fields there. Its pipeline crossed that of Shamrock in Ochiltree County.

In 1961, Cameron was engaged in purchasing crude oil in the Camrick area of Texas and Beaver Counties and transporting it by truck for resale. The Phillips pipeline extension into the Camrick area brought about a considerable reduction in Cameron's trucking business but that reduction is not a basis of the claim here.

In 1963, Mobil Oil, a company not involved in the controversy here, extended its pipeline into the Camrick area from the north.

The area to the east of these lines, in Texas and Oklahoma was undeveloped. Thereafter, beginning in 1963, fields were developed in this eastern area, in Beaver County, Oklahoma, and in Lipscomb County and in the north part of Hemphill County, in Texas.

By August 1963, Shamrock had extended its pipeline eastward into this new area in Lipscomb County to

---

[3]By 1968, Shamrock had extended its line to southern Colorado to obtain oil for its refinery.

connect with the Frass and W. Follett fields. This was pre-Panotex.

During this year of 1963 the Panotex pipeline was conceived by Cameron and commitments from producers were being obtained. Primary equity financing was obtained in late 1963 from Alliance Business Investment Company. In February 1964 a loan was sought from the Houston bank. This effort was unsuccessful and financing was sought and obtained in New York in July 1964. Panotex came into corporate existence in July 1964, its line was commenced in October 1964 and became operative in January 1965.

Meanwhile, as Cameron's president discovered in 1963, Phillips was soliciting commitments from purchasers in 1962 in the Oklahoma part of the Texas-Oklahoma area where Cameron began solicitations in 1963. These solicitations were for production as far east as the Logan area in Beaver County, Oklahoma. Phillips had considerable production of its own in the Como area and was trucking six to seven thousand barrels of oil per day from there to Camrick. This oil amounted to approximately ten per cent of the capacity of Phillips' refinery.

Cameron testified that he began looking at this area after his Camrick trucking operation declined in 1961. His idea was that new pools of oil would be developed in this eastward territory in Beaver and Lipscomb Counties and this proved to be the case in the next few years.

This brings us to the relevant markets. Plaintiffs tried the case on the theory of three relevant markets. We will consider the case on that basis and without determining the correctness of the delineation.

Area I, according to plaintiffs' theory of suit, is the Camrick area, heretofore described. It was served by Phillips' pipeline beginning in 1961 and by Mobil beginning in 1963. Panotex has never entered this market.

Area II is south Beaver County and mainly the Balko, Elmwood and Como fields in that county. Phillips extended its pipeline east through the Balko and Elmwood fields and to Como in September 1964. Panotex constructed its line westward through these fields in January 1965. Prior to these extensions, Cameron and Phillips were advised of what the other proposed to do.

Shamrock served neither Area I or II by pipeline. Phillips does not serve Area III. Area III consists of the Logan field in Beaver County, Oklahoma and all of Lipscomb County, and the Feldman field in Hemphill County, Texas. It is served by Shamrock and Panotex. The Panotex line began at the Shell pipeline at Elk City in Beckham County, Oklahoma, considerably southeast of the areas in question, and thence extended in a northwesterly direction into fields in Lipscomb and Hemphill Counties, Texas, namely the Feldman, West Higgins, Kelln and Mathers field. It is to be noted that Panotex had a monopoly in these fields until 1968 when Shamrock entered Kelln and West Higgins. The Cranford, Bishop and West Durham fields had

been developed along the line of Panotex by 1968 and were served exclusively by Panotex.

The line of Panotex continued northwesterly to reach the Lipscomb and Bechthold fields in Lipscomb County, Texas, and the Loan field in Beaver County, Oklahoma. It appears that Shamrock reached the Lipscomb field in August 1963 and extended to the Logan and Bechthold fields in August 1964. Shamrock, prior to its extension and the entry of Panotex, had been purchasing oil from the Logan area from a trucker who served the area.

The Case Against Phillips and its Subsidiary

The issue presented is the foreclosing or restriction of a competitor, Cameron-Panotex. The claim is premised on conduct of Phillips, acting alone or in league with its pipeline subsidiary or with Shamrock.

We begin by eliminating Area I. Panotex is not in Area I. Phillips has been there since 1961. Cameron-Panotex makes no case whatever from a factual standpoint on being foreclosed from or restrained in Area I, either through an attempted monopoly or by way of a restraint. The facts at best show only that Area I had no pipeline service until 1961 when Phillips entered. There is no evidence that Cameron-Panotex ever considered entering Area I after the entry of Phillips. The evidence demonstrates no more than a normal business venture on the part of Phillips in entering Area I (Camrick). The issue narrows to Areas II and III.

Area II consists of only three fields, Balko, Elmwood and Como. They are served by Phillips and Cameron-Panotex. Phillips extended east from Area I in September 1964 and Panotex commenced service in January 1965. Phillips had solicited commitments in Area II in 1962 according to Cameron. It was trucking oil out of the area and had production of its own on 16,000 acres of leases in the Como area. Phillips also solicited in the Logan field in Area III. Cameron began solicitations in the area in 1963. There was no previous pipeline service to Area II. Phillips had little success in obtaining commitments.

The evidence disclosed that plaintiffs were purchasing 100 per cent of the Balko production, most of the Elmwood production, fifty per cent of the Como production (Phillips had some production), and all of the Logan production except for one producer. This was the situation immediately upon the completion of the Panotex line and plaintiffs obtained all of the oil that was committed to them. In the ensuing years, Panotex has obtained all new production in Area II and at Logan. Phillips has not connected to a new lease since 1964.

When Cameron announced in 1964 that it had received financing, Phillips met Cameron's price and contract terms. Its prior offers had been higher and its contract terms more stringent. In addition, Phillips agreed with its pipeline subsidiary to guarantee it a seven per cent return on investment as a condition of a pipeline extension into Area II. The commitments of Phillips, according to plaintiffs, were insufficient

to produce such a return. It does appear that the commitments were less than the number theretofore insisted upon by the Phillips pipeline subsidiary. There is no proof, however, that the extension was unprofitable and thus something from which an inference of predatory conduct could be drawn. In meeting the Panotex competition, Phillips took three simultaneous steps: (1) it met Cameron's price offer; (2) it met Cameron's contract requirements as to period of contract; (3) it guaranteed its pipeline subsidiary a seven per cent return so as to replace its trucking operation with a pipeline. The proof stops here. It goes no further than to show that Phillips needed the oil for its refinery and would be preempted by the entry and consequent monopoly of another pipeline. It is true that the evidence shows that Phillips considered Area II as "its own backyard" and sought to protect its position in the area. This, however, amounts to nothing more than a proper business motive under the circumstances. Cf. *Times-Picayune Publishing Company v. United States*, 1953, 345 U.S. 594, 627, 73 S.Ct. 872, 97 L.Ed. 1277, on the necessity to prove something more than a "step predominantly motivated by legitimate business aims ..." to show an intent to monopolize.

At this point we find that the evidence of a conspiracy between Phillips and its pipeline subsidiary is nonexistent from the point of showing a violation of §§ 1 or 2 of the Sherman Act.

This is likewise true as to showing an attempt to monopolize on the part of Phillips. Assuming *arguendo*, intent and a relevant market, a dangerous probability

of success is clearly lacking. See *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203, 206-08.

The action of Phillips in extending into Area II did not rise above a protective motive. Phillips was already present through a trucking operation and through its own production. Panotex was transporting in another direction and away from Phillips' refinery. Protection of its refinery by the assurance of some of the oil reserves in Area II was no more than a normal business practice absent conduct calculated to bar the entry of a competitor into Area II or to drive a competitor out of the area. The proof disclosed no such conduct on the part of Phillips. There was no proof of predatory conduct or of conduct which was illegal per se. It follows that the proof was insufficient to make a jury question as to a restraint of trade by Phillips from the conduct disclosed to this point.

Plaintiffs urge that Phillips violated the Sherman Act by allegedly blocking Cameron's application for a loan from the Houston bank with which to construct Panotex. The Chairman of Phillips happened to be a director of the bank. Phillips had been a long time large depositor in the bank. The other side of the coin is that the loan was never formally rejected although some five months of negotiations took place. The bank was troubled by the probability of success of the venture, considering competitive pipelines in the proposed Panotex area and the status of Cameron's commitments. There is no evidence that Phillips influenced by word or deed the decision not to make the loan. There the matter ends. A Phillips officer on the bank

board and a Phillips deposit in the bank will not suffice as a base for an inference of loan influence and in turn, for an inference of an antitrust violation. The bank sent a consultant to discuss the prospects of Panotex with Phillips and Phillips advised that it intended to compete for the oil. This was a business judgment in line with the needs of its refinery. Phillips was not willing to give up the area where it competed to Panotex.

There is one other charge against Phillips and it stems from an alleged division of markets as between Shamrock and Phillips. This will be considered following the discussion of the case against Shamrock.

The Case Against Shamrock and Its Subsidiary

There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex. The subsidiary pipeline did no more than build lines, set prices and make purchases. Shamrock's prices were uniform throughout the Shamrock system except in one instance. This one instance occurred for a short time in the Logan and Bechthold fields. Shamrock first attempted to pay producers a price less than that paid by Cameron. When Cameron obtained commitments from eighty per cent of the producers, Shamrock raised its net offer to the producers. After this price increase, Shamrock's price, while exceeding that of Cameron by two cents per barrel, was uniform with its prices throughout the remainder of its system.

Moreover, Cameron had contracts with its producers to hold them providing it met the prices of others.

The competition between Panotex and Shamrock was all in Area III. By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act. The proof is clear that there was no dangerous probability of a monopoly.

We conclude that the evidence was insufficient to make jury issues on the charges against Shamrock to this point.

The Alleged Phillips-Shamrock Conspiracy

The proof was that Phillips and Shamrock had been competing in the general area involved for more than 40 years. There was evidence as to specific examples of competition between them. Plaintiffs' case, however, comes down to evidence of a elephone conversation between Phillips and Shamrock, made to Phillips by Shamrock in 1964, wherein Shamrock inquired whether Phillips had any interest in extending into the Logan area. Phillips answered that it did. Shamrock replied that it too would also have to go into Logan and that "it won't be the first time we have been competitors."

Plaintiffs make much of the fact that Shamrock extended to Logan and Phillips did not. Phillips went no further east than the Como field in Area II while Shamrock went no further west than Logan. Standing alone, this might give rise to an inference of a division of markets between Phillips and Shamrock to the detriment of their mutual competitor, Panotex. But this evidence does not stand alone.

Phillips had been seeking commitments in the Logan area without success. Panotex had every producer in the field except one. Shamrock acquired that one. The interest of Phillips was such that it staked a right of way into Logan but abandoned the prospect for lack of business.

Phillips had production of its own in the Como field and some additional suppliers. These facts gave good reason for Phillips to stop at Como and for Shamrock to stop at Logan. They established a basis for a business judgment resting on the idea that a certain amount of production was necessary to warrant the expense of extending the pipelines. Any inference of a division of markets must give way to these facts.

This case began in 1964. It has been strenuously developed through discovery and otherwise. It occupied more than two weeks of trial time. In the end there is no substance to plaintiffs' claims. Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from estab-

lished facts, we have nothing more than competition between the parties.

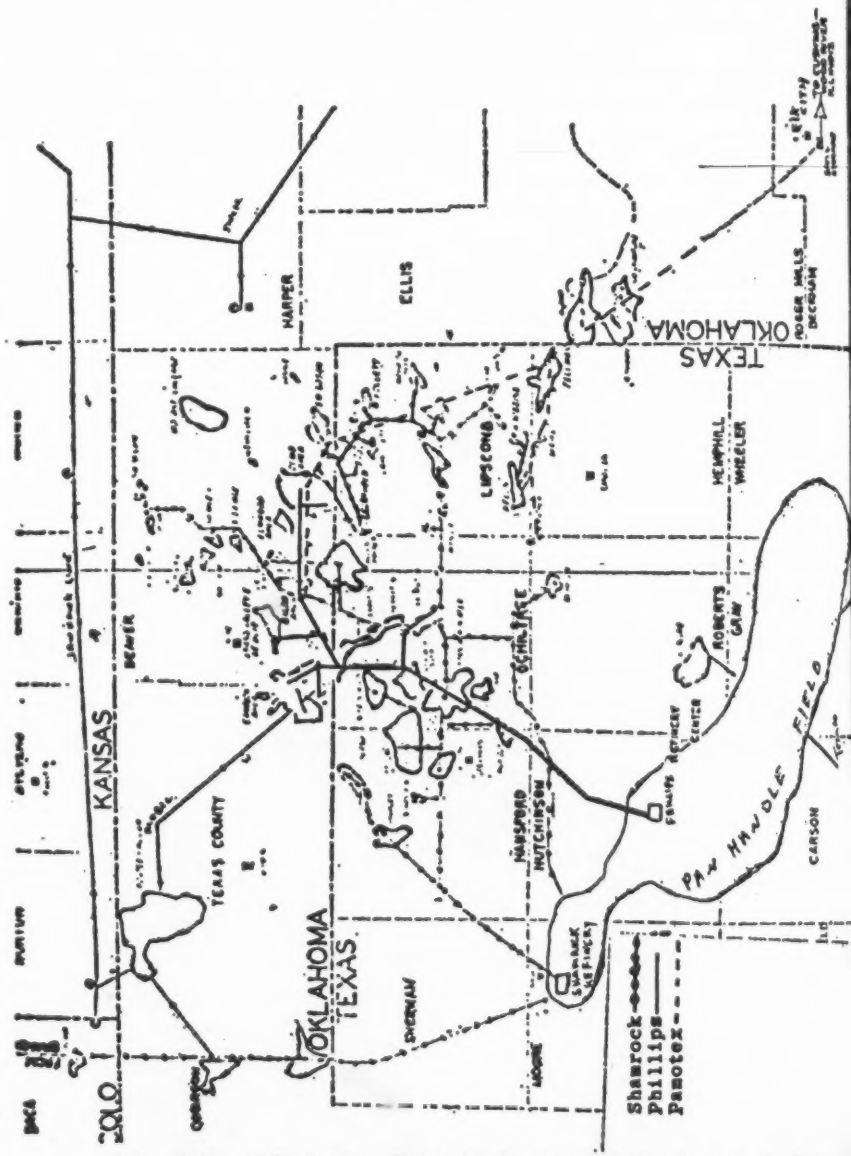
It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. *Northern Pacific Railway Company v. United States*, 1958, 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed. 2d 545. Plaintiffs, of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more.

We hold that the district court did not err in directing verdicts for Phillips and Shamrock.

AFFIRMED.

PANOTEX v. PHILLIPS PETROLEUM CO.

APPENDIX "A"



Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.